

1  
2  
3  
4  
5  
6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 AMERICAN ECONOMY INSURANCE  
12 COMPANY, an Indiana corporation,

13 Plaintiff,

14 vs.

15 NICEFORO HERRERA, individually and  
16 doing business as ACUPULCO'S  
17 PRODUCE MARKET; NICHOLAS M.  
18 FINTZELBERG doing business as  
19 MILNIK TRUST PROPERTIES; LUIS  
20 BENITEZ; and JOHANNA BENITEZ, by  
21 and through her guardian at litem, Luis  
22 Benitez,

23 Defendants.

CASE NO. 06cv2395 WQH (CAB)

**ORDER**

24 HAYES, Judge:

25 The matters before the Court are the Motion for Partial Summary Judgment (Doc. # 44)  
26 filed by American Economy Insurance Company ("American Economy"), and the Motion to  
27 Dismiss Defendants Luis and Johanna Benitez without Prejudice (Doc. # 69) filed by  
28 American Economy.

On October 30, 2006, American Economy filed a Complaint in this matter seeking  
declaratory relief and rescission (Doc. # 1).

On September 13, 2007, American Economy filed the Motion for Partial Summary  
Judgment. No party filed an opposition to the Motion for Partial Summary Judgment.

On January 16, 2008, Magistrate Judge Cathy Ann Bencivengo held a mandatory

1 settlement conference and issued an order following the mandatory settlement conference  
2 (Doc. # 63). The order states that Defendants Herrera and Fintzelberg appeared with counsel,  
3 and that Defendant Benitez failed to appear on his own behalf and as guardian ad litem for  
4 Defendant Johanna Benitez. The order states that the “parties who were present resolved the  
5 matter on the following terms. Plaintiff American Economy will dismiss its claim with  
6 prejudice against Defendant Fintzelberg . . . . Plaintiff American Economy and Defendant  
7 Herrera will submit a joint motion for a consent judgment of rescission.” *Id.*

8 On January 18, 2008, American Economy and Defendant Fintzelberg filed a joint  
9 motion to dismiss with prejudice the complaint against Nicholas Fintzelberg, doing business  
10 as Milnik Trust Properties (Doc. # 64). On January 23, 2008, this Court issued an order  
11 granting the joint motion to dismiss and dismissing all claims against Defendant Fintzelberg  
12 with prejudice.

13 American Economy and Defendant Herrera have not yet filed the joint motion for a  
14 consent judgment of rescission pursuant to the Magistrate Judge’s January 16, 2008 order.

15 On March 14, 2008, American Economy filed the Motion to Dismiss Defendants Luis  
16 and Johanna Benitez without Prejudice pursuant to Rule 41(a) of the Federal Rules of Civil  
17 Procedure. American Economy requests that the Benitezes be dismissed from this case on  
18 grounds that American Economy does not need to proceed against them because they have not  
19 filed a wrongful death action in this case, and the statute of limitations for wrongful death  
20 actions has passed. American Economy states that it moves for voluntary dismissal “[s]ince  
21 a stipulation is impossible given the Benitezes’ unknown whereabouts.” *Mot. to Dismiss*, p.  
22 2. No party filed an opposition to the Motion to Dismiss.

23 Rule 41(a) of the Federal Rules of Civil Procedure governs the voluntary dismissal of  
24 an action in federal court. Rule 41(a)(2) provides that unless a plaintiff files a notice of  
25 dismissal before the opposing party serves either an answer or a motion for summary  
26 judgment, or the parties stipulate to the dismissal of the action, “an action may be dismissed  
27 at the plaintiff’s request only by court order, on terms that the court considers proper.” Fed.  
28 R. Civ. P. § 41(a)(2). The decision to grant or deny a motion pursuant to Rule 41(a)(2) is

1 “within the sound discretion of the trial court and may be reviewed only for abuse of that  
 2 discretion.” *Id.* A court should grant a Rule 41(a)(2) motion for voluntary dismissal unless  
 3 the defendant will “suffer clear legal prejudice, other than the prospect of a subsequent suit on  
 4 the same facts.” *Phillips v. Illinois Central Gulf Railroad*, 874 F.2d 984, 986 (9th Cir. 1989).  
 5 The Ninth Circuit interprets “legal prejudice” to mean “prejudice to some legal interest, some  
 6 legal claim, some legal argument.” *Westlands Water Dist. v. United States*, 100 F.3d 94, 96  
 7 (9th Cir. 1996).

8 No party asserts that voluntary dismissal will result in legal prejudice. The Court  
 9 concludes that voluntary dismissal pursuant to Rule 41(a) of the Federal Rules of Civil  
 10 Procedure will not result in “prejudice to some legal interest, some legal claim, some legal  
 11 argument.” *See Westlands Water Dist.*, 100 F.3d at 96. The Court will grant the Motion to  
 12 Dismiss filed by American Economy.

13 In light of the Court’s dismissal of all claims against Defendants Fintzelberg and the  
 14 Benitez, and the resolution of the matter between American Economy and Defendant Herrera  
 15 as indicated in the Magistrate Judge’s January 16, 2008 order, the Court will deny the Motion  
 16 for Partial Summary Judgment without prejudice.

### 17 Conclusion

18 IT IS HEREBY ORDERED that the Motion for Partial Summary Judgment (Doc. #  
 19 44) is **DENIED without prejudice**. It is further ordered that the Motion to Dismiss  
 20 Defendants Luis and Johanna Benitez without Prejudice (Doc. # 69) is **GRANTED**. All  
 21 claims against Defendants Luis and Johanna Benitez are **DISMISSED without prejudice**.

22 DATED: April 17, 2008

23 

24 **WILLIAM Q. HAYES**  
 25 United States District Judge  
 26  
 27  
 28